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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 498.

IN THE MATTER OF CRIMINAL CONTEMPT OF

THOMAS C. McCONNELL,

Petitioner.

REPLY BRIEF FOR PETITIONER.

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I.

PETITIONER DID NOT THREATEN TO DISOBEY ANY LAWFUL ORDER AND SO COULD NOT BE GUILTY OF CONTEMPT.

The issue between petitioner and respondent has become a very narrow one. At page 32 of respondent's brief, it is said that petitioner's contention that his conduct cannot be deemed contemptuous because the order of Judge Miner which he threatened to disobey was not a "lawful order" is founded on a misconception of the meaning of "lawful" as used in 18 U. S. C. 401(3). However, no authority of this Court or any federal court is cited to sustain this contention. In none of the cases cited at the bottom of page 34 of Respondent's brief was the instant statute construed as the government contends. They involve situations where courts were maintaining the status quo while attempting to adjudicate an issue. In none of them had a trial court abrogated a rule of court which as here had the effect of an Act of Congress.

The section of the statute cited is explicit. It says that a court of the United States has power to punish such contempt of its authority, "*and none other*, as— * * * (3) Disobedience or resistance to its *lawful* writ, process, order, rule, decree or command." (Emphasis supplied.)

Everyone concedes that all petitioner ever threatened to do was to proceed in exact compliance with Rule 43(c) of the Federal Rules of Civil Procedure which, as we have pointed out in our original brief, was promulgated by this Court under the authority of the Congress and is binding on the courts as well as the litigants. (See cases cited page 29, Petitioner's original brief.) The Government's position is, and has to be, that the abrogation of this rule by Judge Miner over the objection of counsel opposing petitioner was a lawful order. As we have stated, no decision of any court is cited in support of this contention. The question is obviously one of first impression in this Court although, as pointed out in our original brief, a number of inferior courts have held the Federal Rules of Civil Procedure to be binding on the judges as well as the lawyers.

The question raised is one of tremendous importance to the trial bar because the Court of Appeals has held that for counsel to threaten to proceed in a trial court in compliance with rules prescribed by this Court constitutes a crime. The Government now says that all a lawyer can do in the face of the abrogation of any Federal Rule of Practice is to appeal, but in the instant case petitioner's client lost the right to assign error on the trial court's ruling because the Court of Appeals held that a proper offer of proof was not made by petitioner on the conspiracy issue. As we have pointed out in our original brief, any deficiency in the offer of proof was created by Judge Miner's unlawful order and this deficiency was utilized

by the Court of Appeals as a basis for affirming the trial court's dismissal of the case.

As stated by the late Mr. Justice Rutledge, the disobeying of an unlawful order does not constitute a crime nor does it constitute contempt "wherever the substantive rights asserted or the opportunity for exercising them would vanish with obedience to the challenged order." (*United States v. United Mine Workers of America*, 330 U. S. 258, 351-2 (1947).) Here, the Parmelee Company's substantive rights were foreclosed "without any possibility for their effective appellate review and determination."

The Supreme Court of California, in dealing with a similar statute, held that a lawyer's disregard of a judge's instructions to "keep seated and wait until the jury is out to make your objections" was justified because "under the circumstances of the case at bench petitioner, if not required to make, was at least justified in presenting, immediate objection to the hereinabove described procedure followed by the judge * * *." (*Cooper v. Superior Court*, 55 Cal. 2d 291, 359 P. 2d 274 (1961).)

Here, no one contends that Judge Miner had any right to overrule this Court and abrogate Rule 43(c). Even Judge Miner later conceded this when he said (R. III, 935):

> "* * * That in the absence of a stipulation, the cases as I read them require the presenting of a witness to ask him some questions, and when I decline to let him answer, then they can proceed with the offer of proof."

The Court of Appeals, in its majority opinion, points out that petitioner had a "right as well as his duty to firmly and respectfully advance plaintiff's claims and assert its rights. In so doing, he had as much right to be in the courtroom and to act as did the judge." (R. V, 62.)

It now appears that petitioner's right to make a proper offer of proof in accordance with rules promulgated by this Court was subject to the exception that if he did so he was guilty of contempt and could be sentenced to ten days in jail. Petitioner most respectfully suggests that a right which can only be exercised at the price of a jail sentence is a right which will be exercised by a very small proportion of the trial bar. Petitioner further most respectfully suggests that to uphold such a contempt order erodes "the fundamental interest of the public in maintaining an independent bar."

II.

PETITIONER ACTED IN GOOD FAITH AND EVEN IF THIS COURT DETERMINES THAT HE WAS WRONG IN BELIEVING THAT JUDGE MINER'S ORDER WAS UNLAWFUL, HE COULD NOT BE GUILTY OF CONTEMPT AS A MATTER OF LAW

The statute involved says in unambiguous language that petitioner could not be held in contempt for threatening to disobey an unlawful order. This Court has held in the *Nye* case, 313 U. S. 33, cited at page 19 in petitioner's original brief, that this statute is a limitation on any inherent power of federal courts to sentence a lawyer for contempt. Respondent can point to no case holding that an order by a trial judge abrogating a rule promulgated by this Court over the objection of opposing counsel can be or is lawful. The trial judge himself conceded that he had no power to enter such an order (R. III, 957). An appeal could not and, as we have pointed out, did not obviate the error and the damage done to the client's case.

Finally, the trial judge conceded that petitioner was acting in good faith when he said (R. III, 1109):

"I have never charged and do not charge now and

never will charge any bad faith in this case on the part of plaintiff's lawyers nor on defendants'."

As stated in the case of *Gallagher v. Municipal Court of the City of Los Angeles*, 31 Cal. 2d 784, 788, 192 P. 2d 905, 908-9 (1948), a "mere mistaken act by counsel cannot render him in contempt of court."

The wisdom of this ruling is apparent here because neither petitioner nor anyone else knows in any definitive way whether Judge Miner's abrogation of the rule was a lawful or unlawful order until after this Court has decided the issue. Certainly, the Government's counsel affords no help on the issue because no authority is cited as sustaining the position that even an unlawful order entered by a trial court while trying a lawsuit is a lawful order. If that contention can be true, there can be little point or purpose in the limitation by Congress on the power of a trial court to punish for contempt to disobedience of a "lawful order" and "none other".

In a footnote at the bottom of page 33 of its brief respondent concedes, "There can be no dispute that petitioner 'was entitled to proceed at least far enough for the record to show he was unequivocally stopped by the court'." Respondent however contends that petitioner was unequivocally stopped by Judge Miner prior to petitioner's remarks. The record fails to support the contention. See colloquy between court and counsel (R. II, 733-735). As stated by Circuit Judge Duffy, "Nevertheless, Mr. McConnell did comply with the Court's order. At that point there was no interference with the conduct of the trial. There was no obstruction in the administration of justice" (R. V, 70). Further, as pointed out by Judge Duffy, "It might be noted that counsel's vigorous insistence on preserving his client's rights bore fruit, as the trial judge later changed his ruling" (R. V, 69).

III.

THE REQUEST FOR AN APOLOGY AS A CONDITION FOR VACATING THE CONTEMPT SENTENCE WAS AN ILLEGAL CONDITION IN THE CONTEMPT ORDER.

Counsel for the Government says that the trial court had full control over its contempt order (Res. Br., 46) but overlooks the implication in the contention. Here, two specifications of contempt entered against petitioner were vacated because insufficient as a matter of law. If petitioner had apologized, he would have admitted guilt under an illegal charge or specification which apology was coerced by a jail sentence. The possible effect upon the career of a trial lawyer in such a situation is, we are sure, obvious to this Court. If this sort of coercion is possible, the legal profession is an exceedingly hazardous one and the Bill of Rights has little, if any, application to trial lawyers.

CONCLUSION.

For the reasons asserted here and in our original brief, the decision of the court below should be reversed.

Respectfully submitted,

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